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U.S. Citizenship  
and Immigration  
Services

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**FEB 24 2004**

FILE: EAC 02 179 51170 Office: VERMONT SERVICE CENTER Date:


IN RE: Petitioner:  
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 103(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a real estate partnership. It seeks to employ the beneficiary permanently in the United States as a mason/tile installer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on September 15, 1997, approved by the Department of Labor March 20, 2001. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner submitted a brief letter from [REDACTED] identified as the Controller of Garden Spires Associates, and resubmitted a copy of the petitioner's 1997 Partnership Income Tax Return.<sup>1</sup>

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on September 15, 1997. The proffered wage as stated on the Form ETA 750 is \$28.01 per hour, or \$58,261 per year.

With the petition, counsel submitted only the I-140 and the ETA 750.<sup>2</sup> Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on September 5, 2002, requested additional evidence pertinent to that ability.<sup>3</sup> Specifically, the Service Center requested that the petitioner provide evidence of its ability to

<sup>1</sup> The tax return submitted on appeal differs in one respect from the tax return submitted previously to the Service Center. While both submissions were accompanied by Schedules K-1 relating to the partner shares for partner Garden Spires Owners Corp, and partner Singh, the submission on appeal does not contain the Schedule K-1, previously submitted for partner Valiotis. No reason was provided for this omission, if it was, in fact, intentional.

<sup>2</sup> We note that various omissions exist in the I-140 submitted by petitioner's counsel. Specifically: 1) Part 1 contains no Tax ID Number; 2) Part 5 has "other" checked for the type of petitioner, with no explanation offered. In addition, various other questions relating to petitioner are left blank; 3) Part 9, is undated and has omitted the attorney's state license number.

<sup>3</sup> The Service Center also noted that the petitioner had failed to submit evidence supporting the beneficiary's training or experience and requested such evidence. The petitioner subsequently submitted evidence in the form of a letter from an employer in Ecuador attesting to such experience. It is noted that the experience letter identified the beneficiary as having worked for the author from

pay the proffered salary of \$58,261<sup>4</sup> as of the priority date of the petition. The Service Center noted three forms of evidence which could be submitted, as well as noting that alternative forms of evidence could be offered. In addition, the Service Center suggested that the petitioner submit the W-2 Wage and Tax Statements for the 1997 and 2001 tax years, (to demonstrate the salary actually paid to the petitioner), as well as the corresponding income tax returns.<sup>5</sup>

In response, on October 15, 2002 the petitioner submitted a copy of Form 1065 U.S. Partnership Return of Income for 1997 for the entity known as Garden Spires Associates, L.P., a limited partnership consisting of 3 partners. That tax return included various schedules, including Schedule L, and Schedules K-1 reflecting the partnership shares for: 1) Gurpreet Singh, identified as a domestic, individual, limited partner with a 2.5% share; 2) Garden Spires Owners Corp., identified as a domestic, corporate, general partner with a 1% share; and 3) Efstathios Valiotis, identified as a domestic, individual, limited partner with a 96.5% share.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and on December 2, 2002, denied the petition.

On appeal, the petitioner has submitted a brief cover letter from Abraham Phillip, identified as the controller for Garden Spires Associates, and has submitted the same 1997 Partnership Tax Return, with the exception of the Schedule K for the partner, Valiotis. The cover letter asserts that the director's decision was erroneous because,

*The Immigration and Naturalization Service has established that, 'in determining ability to pay, three criteria are taken into consideration. They are: 1) ordinary income from Line 21, plus the amount of depreciation from line 14c; 2) net current assets from Schedule L; and 3) net income or loss from Schedule M-1. Ability to pay can be established [sic] by any one of the criteria.'*

The controller's letter goes on to state that the 1997 Partnership Return of Income demonstrated a net income from Schedule M-1, also reflected elsewhere in the return, of \$186,259, which would be sufficient to pay the proffered wage. It also notes that Form 4562, Depreciation and Amortization, reflects depreciation of \$256,413.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d

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January 1989 to January 1991, precisely to the month, the two years' experience required.

<sup>4</sup> The Service Center's Form I-797 requesting additional evidence mistakenly identified the proffered salary as \$28,261 per year. This error was subsequently repeated in one reference to the proffered salary the Service Center's decision.

<sup>5</sup> Although the Service Center noted that petitioner needed to establish the ability to pay beginning with 1997, it only specifically sought records for the first and last years. We believe that records for all years should have been sought. Should further developments occur in this case, we would expect that the ability to pay for all relevant years be addressed.

571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The ordinary income as reflected on line 21 of the Form 1065 reflects \$0. The petitioner argues that this should be supplemented by the amount of depreciation from line 14c. However, as noted above, no authority supports the petitioner's argument. Furthermore, although it appears to be petitioner's position that CIS had previously accepted any of the three identified alternatives to determine the ability to pay, the petitioner fails to cite any specific case, memorandum, or other CIS determination that such alternative methods of calculating ability to pay are acceptable.<sup>6</sup> Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered.

A review of the Form 1065 U.S. Partnership Return of Income for 1997 discloses that the partnership had \$0 in ordinary income, and thus the ordinary income is obviously an inadequate source from which to pay the proffered wage. Alternatively, the petitioner could establish its ability to pay the proffered wage through a comparison of the current assets compared to the current liabilities, as reflected in Schedule L, Balance Sheet. The partnership's current assets consisting of lines 1 through 6 of the Schedule L, column d amount to \$372,421. From this amount, we deduct the current liabilities, as reflected in lines 15 through 17 of Schedule L, or \$357,170. This results in net current assets of \$15,251 available to pay the proffered wage of \$58,261.<sup>7</sup>

Additionally, the petitioner failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 2001, the other year for which records were specifically requested. Petitioner's counsel has submitted no evidence in support of its ability to pay during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>6</sup> It is noted that although this argument is advanced in the Phillip letter, counsel does not appear to be advancing this position in any brief or other document signed by counsel.

<sup>7</sup> Although the petitioner has not raised this issue before the Service Center or on appeal, we note that the Schedule K-1 for the partner, Valiotis, demonstrates a substantial partnership distribution. This distribution is not considered in determining the petitioner's ability to pay the wage as this is not income or assets of the partnership, but rather of an individual, limited partner. As such, the limited partner has no legal obligation to satisfy the obligations through such distributions.